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# IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-1005

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PEOPLE OF THE STATE OF MICHIGAN,
*Petitioner,*
vs.
LEROY PAYNE,
*Respondent.*

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## BRIEF OF APPELLANT ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

## CITATION OF OPINIONS BELOW

The original Opinion of the Michigan Supreme Court dated November 9, 1971 is reported as 191 NW2d 375, and attached as Appendix A to the Petition (pp 11-41). The Opinion of the Michigan Court of Appeals affirming the judgment of the trial Court is reported at 170 NW2d 523, and attached as Appendix B to the Petition (pp 41-55).

## JURISDICTION

The judgment of the Supreme Court of Michigan was entered on November 9, 1971.

Jurisdiction is invoked under United States Supreme Court Rule 19, 28 USCA.

The United States Supreme Court granted Certiorari on October 16, 1972.

## QUESTIONS PRESENTED FOR REVIEW

1. Under the facts of this case, is the second sentence of Defendant fair and in accordance with Due Process?

2. Is this sentence in accord with *North Carolina* v *Pearce*?

3. Should *North Carolina* v *Pearce* be applied retroactively?

## CONSTITUTIONAL PROVISIONS INVOLVED

The applicable United States Constitutional provision involved, in material part, is as follows:

> AMENDMENT XIV Sec 1 . . . nor shall any state deprive any person of life, liberty, or property without due process of law . . .

## STATEMENT OF THE CASE

On the night of November 5, 1962, two police officers, Berrien County Sheriff's Deputies Vic Yost and Charles Plummer, were shot and critically wounded on a street in the City of Benton Harbor, Michigan by two assailants. The assailants were, the driver, Leroy Payne, and the passenger, Lionel Bradford, of a vehicle which the deputies had just stopped for a traffic violation. As the officers exited their vehicle and began walking toward the assailants' car, the two men jumped from that car and began shooting at the deputies. Both officers were hit and immediately downed. Leroy Payne then walked back and, while standing next to Deputy Plummer, fired again at

him at point-blank range. The assailants then left the scene.

Payne was apprehended at his home later that evening. After improper treatment by some police officers, Payne confessed to having participated in the double shooting.

On December 14, 1962, Payne was arraigned in Berrien County Circuit Court before the Honorable Philip Hadsell, Circuit Judge, and pleaded guilty to Assault on Officer Vic Yost with Intent to Commit Murder. At that arraignment, an indication of the coerced nature of Payne's confession first appeared in the record. Defendant acknowledged that he had been threatened and abused, but that he was not pleading guilty because of those threats and that abuse, but rather because he was guilty. (See Appendix C to Petition, pp 55-59).

On February 4, 1963, Leroy Payne testified in the trial of Lionel Bradford that they had together shot the two officers on the night of November 5, 1962. Judge Hadsell presided over that trial.

On March 8, 1963, Judge Hadsell sentenced Payne, noting explicitly in the record the latter's sincere compunction for having committed the offense and his forgiving the officers who abused him as the reasons for his sentence being lighter than it otherwise might have been. He then sentenced Payne to 19-40 years in the penitentiary, suggesting that, should Defendant's contrite attitude continue, he could be released in ten years. (See Appendix D to Petition, pp 59-62).

Michigan Court of Appeals on May 12, 1967, remanded the Payne case to the Berrien County Circuit Court for an Evidentiary Hearing on the voluntariness of Defendant's statement to the police and his plea of guilty.

Berrien County Circuit Judge Chester J. Byrns held that hearing and subsequently filed an Order on June 21, 1967, finding Payne's confessions and his plea to have been involuntarily given and ordered a trial to be held on the matter. Judge Byrns later ordered a change of venue for that trial to Kent County (Grand Rapids), Michigan, to avoid any possible prejudice to Defendant at trial. (See Appenix G and H, pp 40-42).

On August 24, 1967, after a three-day jury trial before Judge Byrns, in which the involuntary confessions were not admitted, and in which Defendant took the stand, denying any involvement in the shooting and establishing an alibi defense, Leroy Payne was found guilty again of Assault on Officer Vic Yost with Intent to Commit Murder.

At the sentencing hearing on August 30, 1967, Judge Byrns imposed a sentence of 25-50 years upon the Defendant, reasons for which he gave during that hearing. (See Appendix E to Petition, pp 62-67).

Two years later, on June 23, 1969, the United States Supreme Court decided the cases of *North Carolina* v *Pearce,* and *Simpson* v *Rice,* both reported at 395 US 711, 89 S Ct 2072, 23 L Ed 656, dealing with the propriety of higher sentences after retrial following reversal of the original conviction.

The Michigan Court of Appeals affirmed the *Payne* case, including the increased sentence on June 25, 1969. (See Appendix B to Petition, pp 41-55). On appeal to the Michigan Supreme Court, that Court affirmed Defendant's conviction but did, in a four to three Opinion, remand for resentencing in accordance with the majority's retroactive interpretation of *North Carolina* v *Pearce, supra.* (See Appendix A to Petition, pp 11-41).

During the course of the Michigan Supreme Court's deliberations, that Court made a formal request of Judge Byrns for an affidavit stating his reasons for imposing the second and higher sentence. Judge Byrns complied. (See Appendix F to Petition, pp 68-71).

Judge Byrns has submitted an additional affidavit in this Court (See Appendix I, pp 42-43).

## ARGUMENT

### I. UNDER THE FACTS OF THIS CASE, IS THE SECOND SENTENCE OF DEFENDANT FAIR AND IN ACCORDANCE WITH DUE PROCESS?

#### A. There are certain points about the sentence from which defendant has appealed which are uncontested.

1. The sentence of 25-50 years was well within the statutory limits.[1]

2. The sentence was properly imposed, i.e., its technical delivery was in proper form.

3. Neither the statutorily permissible, nor the actually imposed, sentence were challenged as being unusually harsh, nor excessive, except as it exceeded the sentence after the first trial. *Weems* v *United States*, 217 US 349, 54 L Ed 793, 30 S Ct 544.

4. No allegation has been made at any stage of this case, even after *North Carolina* v *Pearce*, 395 US 711, 23 L Ed 2d 656, 89 S Ct 2072 (1969) was decided, that Judge Byrns imposed the increased sentence through vindictive or retaliatory motivation, as pointed out by the Michigan Justice Black in his dissent:

> . . . let it be noted that nowhere in the Brief of Mr. Payne does there appear the slightest suggestion or hint that Judge Byrns was 'vindictive'; also that this case was received on Briefs with oral argument waived. (Appendix A to Petition, p 35).

This finding was concurred in by Michigan Justice Brennan.

> As to this case of Payne, I am satisfied that the candid statement of the circuit judge, made on the

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[1] Any person who shall assault another with intent to commit the crime of murder, shall be guilty of a felony, punishable by imprisonment in the State Prison for life or any number of years. MCLA 750.83.

> record at the time of re-sentencing is free of any taint of vindictiveness, and that the sentence should be upheld. (Appendix A to Petition, p 23).

The pre-*Pearce* constitutionality of a higher sentence after retrial was discussed extensively in *Pearce*, in which case reference was made to *Ex parte Lange*, 18 Wall 163, 21 L Ed 2d 872; *US* v *Ball*, 163 US 662, 41 L Ed 300, 16 S Ct 1192; *Stroud* v *US*, 251 US 15, 64 L Ed 103, 40 S Ct 50; *US* v *Tateo*, 377 US 463, 12 L Ed 2d 448, 84 S Ct 1587, in support of the proposition that the Double Jeopardy and Equal Protection clauses of the Fifth Amendment do not prevent the imposition of such a sentence. The *Pearce* Court agreed with that proposition.

**B. The sentencing process is a truth-seeking process.**

*Williams* v *New York*, 337 US 241, 93 L Ed 1337, 69 S Ct 1079, and the case law following thereon, including *North Carolina* v *Pearce, supra*, gave the sanction of this Court to the principle that the sentence following conviction of a crime "should fit the offender and not merely the crime". *Williams* v *New York, supra*, 337 at 241, L Ed at 1341. The person standing before the Bar at sentencing is the one to whom the punishment must be fitted and the key to proper sentencing is a full and complete understanding of the offender, his crime and what his crime says of his "past life, health, habits, conduct and mental and moral propensities". *Williams* v *New York, supra*, US at 245, L Ed at 1341. Thus the law of sentencing should be so structured that as much accurate information as possible is presented to the sentencing agent, be it a judge[2] or jury[3]. See also, *Todd* v *State*, 187 SE2d 1831, (Georgia, 1972).

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[2] In most states sentence is imposed by the trial judge. In Michigan for example Justices of the Supreme Court and Court of Appeals, Circuit Judges and District Court (misdemeanor Court) Judges have the power to pronounce sentence on persons committing crimes cognizable before

(Footnotes continued on next page)

So important is it that we have exhausted all the possible sources of information about a sentence that we allow hearsay, school and work records, reputation, etc. into the pre-sentence reports. The primary test for propriety is reliability.

But, due to the human factor, sometimes the view of the offender at sentencing time either is not complete or is inaccurate. This Court, in *Williams*, recognized that the New York jury trying the merits of that case did not have all the relevant information available as to the defendant's character when it recommended a less severe penalty than the judge in fact imposed. That jury, in a sense, had a *different person* before it than was before the judge through his pre-sentence investigation. The Samuel Titto Williams before the jury was a person who committed a "wholly indefensible murder" in the course of a burglary. *Williams, supra*, US at 243 L Ed at 1340. However the Samuel Titto Williams before the sentencing judge was known to have committed, in addition to a felony-murder, some thirty other burglaries, and was possessed of a "morbid sexuality", and termed by that judge "a menace to society". *Williams, supra*, US at 244, L Ed at 1340.

The distortion or the insufficient understanding of an offender's true character can arise, as it did in *Williams*, through the inadmissibility of evidence at trial relevant to his character and background but irrelevant or unduly prejudicial as to the question of whether he had committed

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their particular court. MCLA 769.1. In Michigan it is the function of the judge and not the jury to impose sentence *People* v *Cole*, 382 Mich 695, 172 NW2d 354 (1969).

The American Bar Association Standards recommend that the sentencing should be vested in the trial judge, ABA *Standards Relating to Sentencing Alternatives & Procedures*, Approved Draft 1968, and The Function of the Trial Judge, Tentative Draft June 1972.

[3] Some states delegate the power to determine the length of prison sentences to the jury. E.G. Texas has adopted the bifurcated trial, with guilty adjudicated first and then a sentencing verdict.

a particular offense. This could occur most often in those states where juries impose sentences.

However, more often it is due to a number of practical rather than legal factors. Too often, especially in our larger urban areas, the pre-sentence officer either suffers from an overwhelming caseload or lack of sources of information concerning the person being investigated, and thus his report at time of sentencing may not accurately portray the offender's true character. Furthermore, the offender himself can distort, either intentionally or subconsciously, his own image by lies or misrepresentations to the pre-sentence investigators and/or the court or jury itself.

Most often this occurs in a plea-bargained situation where crowded dockets and relief at eliminating one more case may tend to encourage perfunctory, superficial pre-sentence investigation. While the means for the assemblage of information relative to a prospective sentencee have increased, it is far from assured that the maximum amount of relevant information existing will be available to the sentencer. And, through the means we have at our disposal for the gathering of such information have substantially increased, so, too, has the caseload with which our pre-sentence investigators must cope.

When a defendant has affirmatively chosen to keep a prosecution alive by asserting and demonstrating that the truth-seeking process leading to his conviction had in some manner been perverted to his detriment, and he asserts and wins what is for all intents and purposes his *first trial*, then, just as the defendant is given the assurance that he has by right a trial on the merits, free from error, due to him, so both the people and the defendant have a right to a sentence of a reconvicted defendant based on the best view possible of him *at the time of resentencing*, whether that view is better or worse than the view at the initial sentencing.

While we have developed an elaborate system of procedural protections for an individual accused of crime, and hedges against the arbitrary exercise of the power of society, the underlying purpose is still the determination of the truth. Ours is an adversary system of criminal pro-

cedure, but one directed towards the discovery of the truth. The "fact-finding" or "truth-seeking" nature of our system of justice has been repeatedly recognized by this Court. *Jackson* v *Denno*, 378 US 368, 12 L Ed 2d 908, 84 S Ct 1774, 1 ALR 3d 1205 (1964); *Linkletter* v *Walker*, 381 US 618, 14 L Ed 2d 601, 85 S Ct 1731; *Tehan* v *Shott*, 382 US 406, 15 L Ed 2d 453, 86 S Ct 459 (1966); *Johnson* v *New Jersey*, 384 US 719, 16 L Ed 2d 882, 86 S Ct 1772 (1966); *Gideon* v *Wainwright*, 372 US 335, 9 L Ed 2d 799, 83 S Ct 792, 93 ALR 2d 733 (1963); *Adams* v *Illinois* ..... US ....., 31 L Ed 2d 202, 92 S Ct 916 (1972).

If then the pre-trial and trial stages of a criminal proceeding are directed towards determining the truth, how much more so is the sentencing proceeding concerned with seeking the truth. The defendant prior to conviction is enveloped by the presumption of his innocence up to the moment of the finding of guilt by the trier of fact, and that presumption permeates the entire proceeding against him. However, from conviction on he stands as a person whose behavior has more or less seriously offended society, and he awaits society's disposition of him. This sentencing process is far less of an adversary contest than a trial on the merits. At sentence we are concerned with the proper way to treat the offender and essential to that determination is finding out who it is we are sentencing. See ABA Standards on *Sentencing Alternatives, supra*, (footnote 2, pp 6-7).

From this point of view it makes no difference when or where we receive information concerning a defendant, just so long as it is reliable. And, viewed strictly from the standpoint of the sentencing process, it matters not whether this is a first, second, or third sentencing; all reliable information should be considered.

### C. The sentencing process affects the appellate process and *Pearce* dealt with that inter-relationship.

The problem that the court in *Pearce* took cognizance of was the inter-relationship between the sentencing process and the appellate process. As in many other areas

the respective rights and liabilities of the state and the defendant are not geometrically separate models but in some areas can seem to overlap. That overlapping requires a balancing of the respective interests to assure a fair and just result.

There are several subsidiary and interdependent questions involved:

1. Can vindictiveness directed at the defendant for having appealed play a part in the second sentencing judge's imposition of a sentence.
2. If it can, is that a *proper* motivation.
3. If it is improper,

   A. What means should be used to remedy a situation where it occurred in the past, and

   B. What means should be used to prevent its occurrence in the future.

4. Is it reasonable for a defendant to fear such vindictiveness.
5. If so, is it reasonable for such fear to play a legitimate role in deterring the defendant from appealing his conviction.
6. If it is not,

   A. How can we remedy past situations where a defendant has been improperly deterred from appealing by fear of judicial vindictiveness for doing so.

   B. How, in the future, can we allay such fear so as to remove such an improper deterrent to the exercise of the right of appeal.

7. Is the imposition of a higher sentence after reconviction after an appeal *ipso facto* evidence of vindictiveness on the part of the sentencing judge.
8. If not, what criteria are we to use in sentencing a person after reconviction in this sort of case.

Let us consider the answers to each of these questions.

1. Realistically, since the judiciary is composed of human beings, individual judges are heir to the same tend-

encies as the rest of humanity. One of those tendencies is to become irritated when someone proves us wrong, especially in a public forum. Further it is true that, since persons who share the same profession can tend to feel defensive about that profession, a certain degree of institutional irritation can arise at seeing one member of that profession being proven wrong.

On the other hand, the judge is a professional person, and as such as a class is called upon to, and, as a general rule, does, exercise a greater degree of self-control in the use of the power given him than those not of that profession.

Thus individual, as well as institutional, vindictiveness toward a successful appellant, civil or criminal, is possible, but less likely than in the population as a whole.

2. In no case that this writer has been able to discover has any court ever approved the actions of a sentencing judge acting out of a motivation of vindictiveness for the defendant's having won an appeal. It is indefensible in an individual or an institution.

3. A. Admittedly, it is a difficult fact to prove, this vindictiveness, both on the individual and institutional level. But that does not end the question. Difficulty of proof is not a reason for not requiring proof. It is no reason, just because it is difficult to prove judicial vindictiveness, to make a *presumption* that such motivation exists. To do so would be to convict our judiciary without a trial, a presumption of guilt which our whole criminal system is geared to avoid.

The proper method for demonstrating vindictiveness is the time-tested sequential steps: allegation, proof, finding and remedy. In *Payne*, there has never been an allegation, let alone proof, of vindictiveness.)

The *Pearce* rule of "identifiable conduct on the record" was not in existence until 1969. While it may be an appropriate way to insure a record for review, it lacks fairness to use it as a means to remedy a past wrong.

B. Preserving a record of the factual basis for judicial action is an appropriate tool to ensure the ability to discover and remedy vindictiveness in the future, as well as acting as a deterrent.

4. It is reasonable for any person to realize what his fellow humans are capable of, and view it with apprehension as it might affect him adversely. However, the apprehension must be reasonably proportionate to the frequency of the behavior occurring. For example, it is reasonable to be afraid of being mugged on the streets of a large city and therefore to be deterred from going out alone late a night. But it is not reasonable without more to be so afraid and so deterred within a cloistered monastery in the countryside.

5. The answer, if unclear before *Pearce,* is now clearly no.

6. A. Just as with every other question of error, there should first be an allegation of it. After allegation a defendant should be required to present or offer at least enough proof to support a legitimate inference of impropriety, at which point he could either bear the entire burden of proof to an appropriate degree, either beyond a reasonable doubt or by a preponderance, or the burden could be shifted to the state to disprove impropriety. This could be done by affidavits, at least initially, for both sides. This Court seems to have approved that procedure in *Moon* v *Maryland, cert granted* 395 US 975, 23 L Ed 2d 764, (1969), *writ dismissed,* 398 US 319, 26 L Ed 2d 262, 90 S Ct 1730 (1970); *Odom* v *US, cert granted* 399 US 904, 26 L Ed 2d 559, 90 S Ct 2203, *writ dismissed* ..... US ....., 27 L Ed 2d 122, 91 S Ct 112 (1970).

B. Establishing a rule whereby better records are made of the reasons for sentencing is a simple and just way of preserving grounds for either proving or disproving charges of impropriety.

As noted in Justice Douglas' footnote-survey of the status of the law in the states and lower federal courts prior to *Pearce* (*Pearce, supra* L Ed 674) and an annotation on the *Propriety of Increased Punishment on New Trial for the Same Offense,* 12 ALR 3rd 978 with 1972 supplement, the majority view was that in the absence of improper motivation, e.g., vindictiveness for the defendant having appealed, a higher sentence on a new trial for the same offense was proper. It is against that background we must view the sentence of Leroy Payne in 1968 by Judge Byrns.

**D. Judge Byrns was not motivated by vindictiveness in imposing the second sentence.**

Not only has there been to date no allegation of vindictiveness, but the facts of this case clearly demonstrate an absence of such motivation.

1. After the Michigan Court of Appeals on May 12, 1967 remanded the *Payne* case to Berrien County Circuit Court for an Evidentiary Hearing on the voluntariness of Defendant's confession and plea of guilty, Judge Byrns held that hearing and subsequently filed an Order on June 21, 1967 (See Appendix G, page 40-41) finding Payne's confessions and his plea to have been involuntarily given and ordered a trial to be held in the matter.

2. Judge Byrns later ordered a change of venue for that trial to Kent County (Grand Rapids), Michigan, to avoid any possible prejudice to Defendant at trial, (Appendix H, p 41-42).

3. On August 24, 1967, after a three day jury trial before Judge Byrns, in which no mention of the involuntary confessions or plea was allowed and in which Defendant took the stand to deny any involvement in the shooting and to establish an alibi defense, Leroy Payne was found guilty again of assault on Officer Vic Yost with intent to commit murder.

4. At the sentencing hearing before Judge Byrns on August 30, 1967, Judge Byrns spoke at length about the Defendant, his crime and the sentence to be imposed, (Appendix E to Petition, pp 62-67), in which the following statement was made by Judge Byrns:

> The larger sentence which I impose here is based on the nature of the crime and on the impressions which I formed of you and of the crime for the three days of the trial and what I honestly believe your crime showed of your character and attitude.

5. During the pendency of the appeal before the Michigan Supreme Court Judge Byrns at the request of that Court filed an Affidavit of Reasons for sentencing (Appen-

dix F to Petition, pp 68-71), in which Judge Byrns stated in paragraph 8:

> Frankly, I was then and am now of the opinion that Mr. Payne repeatedly lied under oath at the trial before me. While a sentencing judge receiving a guilty plea an expression of regret from the defendant might find remorse and a resolution to rehabilitate from such a defendant, which might limit the sentence, I could not so find this in Mr. Payne. I was charged with the judgment of determining how long an individual should be confined, which in turn depends on my judgment of his character and his real desire for rehabilitation according to the facts and impression I received. (Appendix F to Petition, p 69).

6. The Leroy Payne before Judge Hadsell was a contrite and penitent man, forgiving his abusers as he wished to be forgiven by Officer Yost. (Appendix C to Petition, pp 55-59). But the Leroy Payne before Judge Byrns had no such apparent remorse. Judge Byrns had found Payne to have lied on two occasions under oath. (See Judge Byrns' affidavits, Appendix F to Petition, pp 68-71; and Appendix I, pp 42-43).

Nowhere in the entire proceeding was there the slightest hint of Judge Byrns being vindictive towards the Defendant for having appealed. Quite the contrary, he materially aided the Defendant by his findings of fact as to the involuntariness of the confession and plea of guilty, as well as granting a change of venue on motion before trial for a crime which had taken place six years previous, and without employing the customary practice of first attempting to pick an impartial jury in the County of original venue. This crime, though well publicized at the time of the offense, presumably was not as fresh and well-remembered by the public as it would have been at the time the crime occurred. In fact, the picture we have is of a judge going out of his way to protect the Defendant's rights.

Based upon the law as it existed prior to *Pearce*, considering the nature of the sentencing process as fitting a punishment to the latest and best view of that defendant,

the lack of any vindictiveness in the imposition of this sentence, the sentencing here was proper and within the trial judge's discretion.

## II. IS THIS SENTENCE IN ACCORD WITH *NORTH CAROLINA* v *PEARCE?*

We come now to the underlying concerns of this Court in *North Carolina* v *Pearce, supra.* In *Pearce* this Court explicitly approved the "prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime" *Williams* v *New York*, US at 247 L Ed at 1342. *Pearce,* US at 723 L Ed 2d at 668. But the Court in *Pearce* had two factors to balance against giving full play to the discretion of the second sentencing judge to impose a sentence which would be greater or less than the original.

### A. *Pearce* sought to protect the integrity of the sentencing process.

First it sought to protect the integrity of the *sentencing* process against a potentially disastrous motivation on the part of that second judge: vindictiveness. If a judge could with impunity sentence a person not based on the man's true character, but rather with a mind to "teach him a lesson for having appealed", then the second sentence would have been a sham, a perverted use of the State's power for a clearly base reason, to punish a man for having exercised his legal right. The State would thus, as Mr. Justice Black said in his separate opinion in *Pearce*, "be making it a crime to win an appeal. . . . It would create doubt, ambiguity, and uncertainty, making it impossible for citizens to know which one of the two conflicting laws to follow." (*Pearce,* US 738, L Ed 2d at 677). Thus a sentence imposed out of vindictiveness would be illegal, and in fact void. The integrity of this sentencing process must be protected. Thus the Court in *Pearce* said:

> Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. (*Pearce,* US at 725 L Ed at 669).

**B. *Pearce* also sought to protect the integrity of the appellate process.**

A second consideration was the protection of the integrity of the *appellate* process. Neither the courts nor any person or institution involved in the criminal process may "chill the exercise of basic constitutional rights", *US* v *Jackson,* 390 US 570, 581, 20 L Ed 2d 138, 147, 88 S Ct 1209, Appeal through a State appellate system has been held not a Federal constitutional requisite, but, when established, it must be kept free from unreasonable obstacles. *Rinaldi* v *Yeager,* 384 US 305, 310-311, 16 L Ed 2d 577, 581, 86 S Ct 1497. But a state-approved policy of higher resentences for those reconvicted after successful appeal, out of pure vindictive motivation, would be patently unconstitutional. However, the Court, while noting that "increased sentences on reconviction are far from rare" (*Pearce, supra* L Ed 669) properly did not attempt to allege that any such policy was in effect anywhere. That type of motivation had already been condemned prior to *Pearce* thus the Court said:

> And since the fear of such vindictiveness may unconstitutionally deter a defendant's right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge. (*Pearce, supra* L Ed at 669).

Thus the Court found that the due process clause protects both the sentencing process and the appellate process. The problem then became how to balance the punishment-fit-the-criminal theory of sentencing with the assurance of no-judicial-vindictiveness for appealing and elimi-

nation of a reasonable apprehension of such vindictiveness by a convicted offender contemplating appeal.

### C. *Pearce* promulgated a prophylactic rule to assure the integrity of these processes, but the language of that rule has been variously interpreted.

In *Pearce*, after disposing of the arguments that the higher sentence is prohibited by the Double Jeopardy clause or the Equal Protection clause of the Federal Constitution, the court said:

> A trial judge is not constitutionally precluded, in other words, from imposing a new sentence, whether greater or less than the original sentence, in the light of events subsequent to the first trial that may have thrown new light upon the defendant's 'life, health, habits, conduct, and mental and moral propensities'. [Citing *Williams* v *New York, supra*]. Such information may come to the judge's attention from evidence adduced at the second trial itself, from a new pre-sentence investigation, from the defendant's prison record, or possibly from other sources. The freedom of a sentencing judge to consider the defendant's conduct subsequent to the first conviction in imposing a new sentence is no more than consonant with the principle, fully approved in *Williams* v *New York, supra*, that a state may adopt the 'prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime.' Id at 247, 93 L Ed at 1342. (*Pearce, supra* US at 723 L Ed at 668).

Then the Court went on to formulate what it recently (*Colten* v *Kentucky*, ..... US ....., 32 L Ed 2d 584, 92 S Ct ....., (June 12, 1972)), called a "prophylactic rule".

Assuming for the moment, as the Michigan Supreme Court did in the decision before this Court for review, that the *Pearce* prophylactic rule applies to Judge Byrns' sentence of the Defendant, let us note first the manner in which this question was handled by the Michigan Supreme Court.

Resolution of the federal constitutional question raised by appellant Payne requires interpretation and application of the following language from *Pearce, supra:*

> Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.
>
> In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon the defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal. (*Pearce, supra,* US at 725-726 L Ed 2d at 669-670).

The above language raises the following question: May the judge who imposes a harsher sentence upon reconviction rely on information not possessed by the first judge regarding defendant's conduct prior to the time of his first sentencing? If not, the sentence imposed by Judge Byrns was excessive because it appears his only knowledge of Payne's conduct *after* the first sentencing was that he had earned "good time" while in prison and had been taking advantage of prison educational and rehabilitation facilities. Judge Byrns stated, *supra,* that he based his decision to im-

> pose a stiffer sentence on impressions of Payne and his crime formed during the trial.
>
> The question arises primarily because of ambiguous language in the following sentence from *Pearce*, *supra*, quoted earlier: 'Those reasons [for imposing a harsher penalty] must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.' (At page 726).
>
> Does 'occurring after . . . the original sentencing' refer to defendant's 'identifiable conduct' or to acquisition of 'objective information' regarding his conduct before or after original sentencing? . . . (Michigan Supreme Court, *People* v *Payne*, Appendix A to Petition, pp 18-19).

After noting that the lower courts have split after *Pearce* regarding the interpretation of the cited language from *Pearce* as well as noting that the United States Supreme Court had not clarified the question of retroactivity of *Pearce* in the case of *Moon* v *Maryland*, *supra*.

> Pending clarification of *Pearce's* requirements by the United States Supreme Court, we are persuaded that those courts are correct which have interpreted *Pearce* to require that the 'identifiable conduct' of the defendant upon which a resentencing judge relies in imposing a stiffer sentence must have occurred *after* the first sentencing. (Appendix A to Petition, pp 20-21).

Finally, the Michigan Supreme Court stated its holding:

> We conclude, and hold, that the imposition of a harsher sentence upon reconviction following appellant Payne's successful appeal was constitutionally impermissible because the record of the second sentencing does not disclose 'objective information concerning identifiable conduct on the part of the defendant occurring after

> the time of the original sentencing proceeding.' (*Pearce, supra,* at page 726.) (Appendix A to Petition, p 21).

Since the Michigan Supreme Court has decided to "apply *Pearce* in the present case in order to instruct our trial courts as to the Michigan interpretation of an ambiguous portion of *Pearce,* discussed infra, *pending clarification by the United States Supreme Court*" (Emphasis added) (Appendix A to Petition, p 15), that Court has promulgated a rule based upon its interpretation of *Pearce* which, though it may or may not in this case be dicta, still is binding "pending clarification" by this Court of what it meant in *Pearce.*

The question of what information concerning a defendant may be taken in consideration on a second sentencing has been discussed since *Pearce* in several cases besides *Payne.*

In *US* v *Barash,* 428 F2d 328 (2nd Cir 1970) the defendant had been convicted on twenty-six counts of bribery, was sentenced to one year and one day on each of the counts (to be served concurrently) and subsequently won a new trial on appeal. He was sentenced to higher terms than had been imposed after the first trial. Citing *US* v *Coke,* 404 F2d 836 (2nd Cir 1968) and *Pearce* as authority, the court stated:

> We, therefore, hold that the rules enunciated in *Pearce* and *Coke* prohibit (absent the justifications there enumerated) an increase in the punishment imposed after a conviction on retrial . . . (*US* v *Barash, supra*).

As noted in *Barash,* the *Coke* court cited as reasons for an increased sentence:

> . . . 'defendant's conduct since sentence was initially passed,' or . . . new information which had not come to the attention of the judge imposing the first sentence because of some action chargeable to the defendant. (*Barash, supra,* page 330).

In *Coke, supra* a pre-*Pearce* case, the court stated as follows apropos of this case:

> We pause also to note some types of reasons why a judge may conclude that a higher sentence is required after a retrial. One is that noted by the first Circuit in Marano v United States, 374 F2d 583 (1967), namely, where the defendant has engaged in anti-social activities after his first sentence — a situation frequently encountered in narcotics prosecutions but not unknown in others. Another is where the new trial reveals the crime to have been more dastardly or the defendant to have played a much larger role than was first supposed. This may occur for a variety of reasons. One is where the first conviction was on a plea of guilty, as in United States ex rel Starner v Russell, supra, 378 F2d 808, and the judge may have had only a bare outline of the offense. Another instance would be where the defendant takes the stand at the second trial and produces an impression as to guilt contrary to that intended. A third is where evidence previously unavailable to the prosecution shows that the defendant instead of being a minor cog was the master mind; a judge might well be disinclined to allow such a defendant to escape with a sentence lower than that given to others who were simply his tools. Instances such as these suffice to demonstrate that, despite contrary *ipse dixits*, the state may have an important interest in the imposition of a sentence that appears just in light of the latest and best information. (*Coke, supra,* at page 842-3)

Also, the 8th Circuit in *United States* v *Gross*, 416 F2d 1205 (8th Cir 1969), deciding a case in the light of *Pearce*, while finding that the sentences imposed did not meet the standards laid down stated with reference to *Pearce*, said:

> The court there held, in a state case, that neither the double jeopardy provision nor the Equal Protection Clause imposes an absolute bar to a more severe sentence upon reconviction. A judge is not constitutionally precluded from imposing a heavier sentence

> in the light of events subsequent to the first trial, such as new evidence adduced at the second trial or received from presentence investigation 'or possibly from other sources.' [citation to *Pearce* at US 723] (*US* v *Gross, supra* at page 1215).

*United States* v *Kienlen,* 415 F2d 557 (10th Cir 1969), also post-*Pearce,* presented the case of a defendant whose plea of guilty brought him a twelve year sentence, after which he appealed and won a trial. After a jury verdict of guilty, the judge imposed a sentence of eighteen years. The judge's observations prior to sentence in *Kienlen* are strikingly similar to those of Judge Byrns in this case. The *Kienlen* judge said:

> I certainly gained the impression [at the trial] and came to believe and now believe, and largely this is from the testimony of the defendant's witnesses, his mother, his former wife, that this defendant is a brutal, assaultive type, that this information, if I had known it — I don't want to say that there wasn't any indication of that in the earlier presentence report, but to read something in a cold presentence report and to hear the witness, one by deposition and the other testifying from the stand, together with all the other information that has come to me since the original sentence was imposed, I have come to the conclusion that the sentence imposed on May 27, 1966 . . . was a lesser sentence than this defendant deserved, so the sentence to be imposed today will be a greater sentence. [*Kienlen, supra* at page 559].

Then the trial judge after a brief colloquy stated:

> I want it clearly understood that what I have said with respect to increasing the sentence or, rather, imposing a more severe sentence than I had before, is not to be taken by anyone as punishment for the exercise of constitutional rights by this defendant. (*Kienlen, supra* page 560).

Finally, the *Kienlen* court stated its assessment of the second sentence:

> In our judgment, this meets the *Pearce* standard. Naturally, the statement of the trial judge that he was not penalizing the defendant for exercising his constitutional right to appeal is not conclusive. But it is indicative of the sentencing climate. The decision was clear and rational. Finding this sentence altogether compatible with *Pearce,* we need not consider the possible retroactivity of *Pearce.* (*Kienlen, supra* page 560).

At least two state courts other than Michigan have considered the question of what type of conduct may be considered and have arrived at different conclusions. The Wisconsin Supreme Court in *Denny* v *State,* 178 NW 2d 38, (1970) considered *Pearce* and interpreted it in line with a pre-*Pearce* case of the same Wisconsin Supreme Court, *State* v *Leonard,* 159 NW 2d 577 (1968). Faced with taking either a broad or narrow interpretation of the "identifiable conduct" of *Pearce* the Wisconsin court stated:

> However, we do not read *Pearce* so narrowly because the Court said, page 723, 89 S Ct page 2079, 'a trial judge is not constitutionally precluded, in other words, from imposing a new sentence, whether greater or less than the original sentence, in the light of events subsequent to the first trial that may have thrown new light upon the Defendant's "life, health, habits, conduct, and mental and moral propensities." ' [Citing Williams v New York] This information, the court points out, may come to the attention of the judge in the second trial or from a new presentence investigation or the prison's record or from other sources. 'Subsequent events' may be the disclosure of facts unknown at the time of the first sentencing and this might well happen if no presentence report was used in the first sentencing. (*Denny, supra,* page 41)

The Wisconsin Court then adopted Justice White's concurring opinion in *Pearce,* saying "this statement is more

in accord with the language of our *Leonard case* in which we stated that the trial judge could consider events which occur or come to the attention of the sentencing court subsequent to the first sentencing." (*Denny, supra,* page 41).

The Illinois Supreme Court in *People* v *Baze,* 253 NE 2d 392 (1969) took the opposite view in what was obviously dicta to that case.

> Applying the *Pearce* rule to this case it would appear that evidence of defendant's prior convictions prompted the court, on retrial, to increase the sentence. That evidence was known at the time of the original sentencing, since the court docket recites that on defendant's original sentence evidence was heard in regard to aggravation and mitigation. However, regardless of whether such convictions were initially known, or whether they came to light on retrial when the court heard only evidence in aggravation, those convictions involved conduct of defendant occurring *prior* to the original sentencing. Such conduct could not be the basis for imposing a heavier sentence on retrial under the *Pearce* rule. In the absence of an affirmative showing of identifiable conduct on the part of defendant occurring *after* the original sentencing, on which the increased sentence was based, the imposition of the heavier sentence on retrial here violated the constitutional right to due process of law. (*Baze, supra,* page 395)

*Barnes* v *United States,* 419 F2d 753 (DC Cir 1969) cited by the Michigan Supreme Court in its opinion (Appendix A, to Petition, p. 19) does not really reach the question posed but is rather one in which the majority and the dissent were concerned about which type of modified sentence most achieved the result the court wanted.

*Torrance* v *Henry,* 304 F Supp 725 (US DC Ednc, 1969) dealt with a higher sentence after a de novo trial in a situation parallel to that found in *Colten* v *Kentucky, supra.* and thus the contrary view held by the US Supreme Court would prevail.

*Pinkard* v *Neil,* 311 F Supp 711 (US DC Md Tenn, 1970) is perhaps the most forthright adoption of the "narrow"

interpretation of *Pearce* and clearly interprets *Pearce* as limiting "identifiable conduct" to what the defendant actually does after his first conviction. Although it was not stated explicitly in the district judge's opinion, it appears from the *State ex rel Pinkard* v *Henderson*, 452 SW 2d 908 (Court of Criminal Appeals of Tennessee, 1969) that both the original sentence of twenty years and the subsequent sentence of ninety-nine years were imposed by a jury, in accordance with Tennessee law. The Court of Criminal Appeals noted in its opinion that there were no averments that the second jury even knew of defendant's obtaining a new trial, and on that ground found that the vindictiveness rationale underlying *Pearce* did not warrant the application of *Pearce* in any way. Thus it is apparent that the federal district judge went beyond the facts of *Pearce* and extended *Pearce* to jury-imposed resentencing, an entirely different ballgame than that where the sentencer actually is aware of the prior trial and appeal.

Though the facts in the case before this Court do not raise the question of whether or not *Pearce* applies to jury-imposed sentences, it is appropriate here, since there has been considerable litigation on this point, to note that since the underlying rationale of *Pearce* is that there should be no *vindictiveness for having appealed* or *reasonable apprehension* of vindictiveness for having appealed as the result of the constitutional permissibility of higher sentences on retrial, how can *Pearce* apply to jury-imposed sentences, where the jury is unaware of the fact that the defendant has received this trial as the result of an appeal? Vindictiveness for taking an appeal implicitly requires that the person being vindictive knows of the prior appeal. This is brought up only in passing because it illustrates how we presume, probably unconsciously, that the second sentencing agent must necessarily fight off the temptation to retaliate for the defendant's good fortune in winning an appeal. And when it is possible to obtain a second sentencer who has no knowledge of any prior proceedings in the case does it not *ab initio* remove the case from the purview of *Pearce*? (By this discussion, the writer does not intend to offer either approval or disapproval of the concept of jury sentencing.) Relative to

jury-imposed sentencing, see *Manns* v *Allman,* 324 F Supp 1149 (1971); *State* v *Miller,* 231 So 2d 260 (Fla, 1970); *Chaffin* v *Stynchcombe,* 445 F 2d 640 (5th Cir 1972); *Jerry* v *State,* 496 P2d 422 (Okla 1972); *Branch* v *State,* 445 SW2d 756 (Ct of Crim App, Texas, 1969).

Another case cited by the Michigan Supreme Court as adopting the "narrow" interpretation of *Pearce* is *Walsh* v *Commonwealth,* 260 NE2d 911 (Supreme Judicial Court of Massachusetts, Suffolk, 1970). A perfunctory reading of the case indicates that its facts are radically different from *Payne.* In *Walsh* the question under review was the sufficiency under *Pearce* of the Massachusetts procedure for appellate review of sentences in criminal cases. The holding of that Court was specifically that *Pearce* did not apply to this type of post-conviction review because the rationale supporting *Pearce* was found not to have a fertile soil in the Massachusetts sentence review system. Referring to *Pearce* the *Walsh* court said:

> It is not clear from the Court's opinion whether the same judges who had sentenced the two defendants originally resentenced them after conviction. Thus, we are not sure whether the court was concerned about the vindictiveness of particular judges or about the possibility of vindictiveness inherent in appellate procedure generally. In the Appellate Division procedure the possibility that vindictiveness of the sentencing judge could effect the ultimate sentence is totally eliminated by statute. He may not sit as a member of the Appellate Division on a case in which he did the original sentencing. Sub-section 28 A.
>
> A study of the results of Appellate Division action shows that it is highly unlikely that any person has been or will be penalized by reason of appealing the sentence imposed by the trial court. The statistical reports on appeals to the Appellate Division for the period of fourteen years ending June 30, 1969, show a total of 4,201 appeals taken. The Appellate Division increased the sentences in only 87 cases representing about 2.07 per cent of the total appeals; and it reduced the sentences in 395 cases representing about

> 9.42 per cent of the total appeals. The remainder of the appeals were either dismissed without change in the sentence, withdrawn by the appellants, declared moot, or were still pending at the end of the year entered. This record of increase in sentence in an average of six cases per year out of an average total of about 300 appeals per year does not support a claim that the ultimate sentences are influenced by vindictiveness, or that the appellants are being penalized solely because they have appealed. Moreover, in the petitioner's case there is no allegation or evidence that his sentence was increased because of this factor. This latter fact may be dispositive of the issue, although we do not decide it on that ground alone. . . .
>
> We note finally that the *Pearce* rule does not seem suited to Appellate Division proceedings. It does not permit consideration of any factors but the defendant's conduct subsequent to the first trial. Such a rule would seriously hamper the work of the Appellate Division because it would limit it to the brief period that the defendant has been serving the sentence in the state prison or a reformatory awaiting hearing on the appeal. Moreover, the rule would preclude consideration of the very factor which the Appellate Division was established to consider: Whether a particular defendant's sentence is excessively short or long compared to other defendant's sentences for the same or similar offenses. Since the Supreme Court was not considering this procedure, we do not believe that it meant the *Pearce* rule to apply to it. (*Walsh, supra,* pages 915 and 916).

Thus, one authority cited by the Michigan Supreme Court for the narrow interpretation would seem to the contrary to support a broad interpretation of *Pearce*. *Walsh* also presents rather interesting statistics on the frequency of various types of sentence changes.

Thus it appears that there is substantial authority for the broad interpretation of the term "identifiable conduct" of *Pearce*. In addition the modern theory of sentencing,

that is to fit the punishment to the criminal, would also seem to weigh heavily in favor of the broad interpretation, allowing the second sentencing judge the most accurate possible view of the person he is to sentence. New information, examples of which were given in the *Coke* case, *supra*, should be part of the second sentencing judge's reassessment of the defendant and he should not be limited to solely the defendant's conduct while in prison, a place more conducive to good behavior than the freedom on the streets (which the defendant presumably had prior to his crime and conviction). See also *People* v *Bernette*, 258 NE2d 793, (Supreme Court of Illinois, 1970).

But in this case though it was not explicitly dealt with by the Michigan Supreme Court there was additional identifiable conduct occurrring after the first conviction and that behavior was noted by Judge Byrns as a reason for his increased sentence. Commenting on Payne's testimony in 1967, attempting to explain away the physical evidence including his fingerprint on the gun used in the assault as well as the testimonial evidence against him, Judge Byrns stated:

> . . . This Court believes this was a tissue of lies and so did the jury.
>
> 8. Frankly, I was then and am now of the opinion that Mr. Payne repeatedly lied under oath at the trial before me. While a sentencing judge receiving a guilty plea and an expression of regret from a defendant might find remorse and a resolution to rehabilitate from such a defendant, which might limit the sentence, I could not so find this in Mr. Payne. I was charged with the judgment of determining how long an individual should be confined, which in turn depends on my judgment of his character and his real desire for rehabilitation according to the facts and impression I received. . . .
>
> On September 2, 1965 nearly three years after his sentence by Judge Hadsell and about two years before I granted him a new trial, Leroy Payne signed an affidavit supporting an appeal of Bradford claiming he

gave "false testimony" at the Bradford trial. He said that the only reason he testified at that trial was due to fear of the police, that Bradford never admitted committing crimes, and that Bradford had denied being present when the officers were shot. Further Payne swore in his affidavit he had hardly known Bradford prior to being arrested, and that he had not been with Payne on either the date of the shooting or the day before. (Appendix F, to Petition, pp. 69-70).

The question of whether or not a defendant's giving testimony which is either perjured or inconsistent with his prior testimony is "identifiable conduct" within the meaning of *Pearce* has been raised and discussed in several cases.

The 4th Circuit, in the *United States* v *Gambert*, 433 F2d 321 (4th Cir 1970) which will be reviewed further on the issue of retroactivity, also applying *Pearce* and *Coke*, *supra* found that:

> While we entertain no doubt that new evidence adduced at the second trial would, under some circumstances, justify increasing the length of the sentence originally imposed [Citing *Pearce*], and that such evidence could possibly be found 'where the defendant takes the stand at the second trial and produces an impression as to guilt contrary to that intended,' [*Coke, supra* at page 843], this new evidence ordinarily would serve to justify a greater sentence only where it 'reveals the crime to have been more dastardly or the defendant to have played a much larger role than was first supposed. United States v Coke, *supra*, page 842. Testimony of the defendant at his second trial which reveals 'inconsistencies and incredible explanations not before the previous sentencing court' does not constitute identifiable conduct of the type contemplated by *Pearce*. The explanation here given for the increased sentence clearly implies added punishment of the defendant without due process of law, for the commission of another crime, the crime of perjury. (*United States* v *Gambert, supra* at pages 323

and 324). See also *United States* v *Salétko,* 452 F2d 199 (7th Cir 1971).

However, the 9th Circuit in *United States* v *Sanders,* 435 F2d 165 (9th Cir 1970), found that the district court judge at the time of resentencing stated sufficient reasons for the higher sentence (20 years as opposed to an original 15):

> 1. Sanders had committed a serious crime;
> 2. Sanders had an extremely poor record as a citizen;
> 3. Sanders had obviously fabricated his defense and testified falsely at his trial, thus committing a further crime of perjury; and
> 4. It was apparent to me after studying the presentence report provided to me by the Probation Officer that Sanders had regressed rather than progressed towards rehabilitation during the time that he was in prison. I was aware of only the first two of these things at the time that I pronounced the initial sentence of 15 years. (Page 165)

The Circuit Court went on to comment on those reasons:

> The stated reasons fully comply with the requirements of *Pearce, supra.* It was appropriate for the district court judge to take Sanders' perjury into account in resentencing, *Williams* v *New York,* 337 US 241, 69 S Ct 1079, 93 L Ed 1337 (1948), and the fact that he had not been favorably considered for parole. (pages 165 and 166)

The argument that there must be a criminal conviction for the "identifiable conduct" which is to be considered in aggravation of defendant's sentence, as the court in *Gambert* seemed to say, would be to adopt an entirely new set of rules for sentencing. The vast majority of the information which sentencing judges are forced to rely upon is behavior which does not result in criminal conviction and does not occur in the judge's presence. For example he relies on what he is told of the defendant's childhood, his educational experience, his past employment, his reputa-

tion in the community and a plethora of other behavior which neither results in a conviction nor occurs in his presence. Since proper sentencing requires an accurate assessment of the sentencee, what better conduct to use than that which occurs before the judge in the course of a trial and especially when that conduct involves a defendant taking the stand and testifying to an alibi which flies in the face of reason and the other evidence presented. In such a situation conviction for perjury would seem unnecessary. In support of this see also *People* v *Brown*, 184 NW2d 226 (1970) (Michigan Court of Appeals), holding perjury at second trial "falls within the 'identifiable conduct on the part of the defendant occurring after . . .' " (at page 226)

Still another reason exists for affirming Judge Byrns' sentence, related somewhat to the last. This writer, when he first joined the Prosecutor's Office was amazed to observe the frequency that a defendant would take the stand, though under the Fifth Amendment not compelled to, and tell a story which, from the other evidence presented and from reports from police and other agencies, it was plain to see was a bold-faced lie. Upon inquiry of the older prosecutors trying the case as to how this was allowed to go on I was told, "Well, everyone's allowed a couple of lies in their own defense". This court in *Harris* v *New York*, 401 US 222, 28 L Ed 2d 1, 91 S Ct 643, stated in another context:

> Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury [citations omitted]. Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately. . . . (US at 225, L Ed 2d at 4)

This writer was unaware at the time of filing the Petition for Writ of Certiorari that Judge Hadsell had presided at the trial of Payne's co-defendant, Lionel Bradford.

## III. SHOULD *NORTH CAROLINA* v *PEARCE* BE APPLIED RETROACTIVELY?

In dealing with the question of retroactivity, notice should be taken of the manner in which the Michigan Supreme Court dealt with it. In footnote 2 of the majority opinion (Appendix A to Petition, pp 14-15), that Court said:

> The United States Supreme Court has not yet decided whether *Pearce* is to be applied retroactively. Although the Court twice granted certiorari to consider the question, in each case the writ was subsequently dismissed as improvidently granted. Moon v Maryland [citation omitted]; Odom v United States [citation omitted]. We decline to predict the high Court's answer to the question of *Pearce's* retroactive or prospective application, but we will apply *Pearce* in the present case in order to instruct our trial courts as to the Michigan interpretation of an ambiguous portion of *Pearce,* discussed infra, pending clarification by the United States Supreme Court.

It is apparent then that the Michigan Supreme Court is in effect applying the standards of *Pearce* retroactively, i.e. *on the authority of Pearce* they are interpreting the "prophylactic rule" as a constitutional requisite applied to a pre-*Pearce* sentencing proceeding.

### A. The lower courts have divided on the question of retroactivity.

Many lower courts have dealt with the question of *Pearce's* retroactivity and the results are split.

To properly understand the lower courts' rulings, we must initially divide *Pearce* into:

a) "credit" cases

b) "resentencing" cases

At least one court applied *Pearce* "retroactively" to give credit for time served but specifically refused to treat the resentencing holding of *Pearce* retroactively. *Allen* v *Henderson*, 434 F2d 26 (5th Cir 1970).

It would seem that the "credit" holding can logically be applied to all cases without requiring that *Pearce* be held retroactive as to resentencing as well. Giving "credit" to a prisoner for all time he has actually served is both logically and legally distinguishable from voiding a sentence. In the first the Court is merely ordering that the "time" that a person is counted as having spent in jail be increased. It has the correlative effect of reducing the remainder of the sentence left to serve, but does not affect in any way the validity of the sentence. On the other hand, in the second, the Court is voiding a court proceeding which was valid at the time it occurred and was so until, as here two years, later.

Dealing with the question of retroactivity of the *Pearce* resentencing rule, the lower courts, State and Federal have split. Those deciding *for* retroactivity include: *Stonom* v *Wainwright*, 235 So 2d 545 (Dt Ct of App of Fla 1st Dist (1970)); *Casias* v *Beto*, 33 F Supp 214 (1971) (US DC ND Tex); *US ex rel Williams* v *McMaum*, 436 F2d 103 (2nd Cir 1970).

Those deciding against retroactivity or withholding ruling until there is a decision from this Court on the question are: *Shedrick* v *State*, 235 So 2d 57 (1970) Dist Ct of Appeals of Fla, 4th District; *Robinson* v *Warden*, 285 A 2d 771 (1969) (Maryland Court of Special Appeals); *Pratt* v *Warden*, 259 A 2d 580 (Md Ct of Sp Apps (1969)); *Lipton* v *Baker*, 432 F2d 245, 10th Cir 1970; *Young* v *State*, 483 P2d 1020 (Sup Ct of Kansas, 1971).

Petitioner feels that a well-reasoned decision on retroactivity is that of *Commonwealth* v *Allen*, 277 A2d 803 (Supreme Ct of Penn) (1971), wherein it was decided that the "prophylactic rule" of *Pearce* should not be applied retroactively.

Perhaps the clearest exposition of the question is found in *United States* v *Gambert, supra*, in which the 4th Circuit separates *Pearce* into its constitutional and its procedural bases. A defendant has a constitutional privilege (Due

Process) from being resentenced by a vindictive judge, and whenever such a privilege is violated the Courts would act to remedy it. However the procedural rule, as to placing on the record identifiable conduct used as a basis for increased sentence should only be applied prospectively.

**B. The Supreme Court's test for the propriety of retroactivity applied to this situation would mean prospective application only.**

This Court's evolving 3-fold criteria for the determination as to the propriety of retroactivity in the criminal area were first clearly stated in *Stovall* v *Denno*, 388 US 293, 297, 87 S Ct 1967, 1970, 18 L Ed 2d 1199 (1967) to be:

"a) the purpose to be served by the new standards,

b) the extent of the reliance by law enforcement authorities on the old standards, and

c) the effect on the administration of justice of a retroactive application of the new standards".

See also *Linkletter* v *Walker, supra, Tehan* v *Shott, supra, Johnson* v *New Jersey, supra,* and *Adams* v *Illinois, supra.*

The purpose to be served by the new rule of *Pearce* is twofold:

1. To protect the integrity of the sentencing process by eliminating vindictive motivation from the judge's reasons for sentencing.

2. To protect the integrity of the appellate process by dissipating the reasonable apprehensions of that vindictiveness from the minds of those contemplating appeal.

But making this rule retroactive would not serve to remedy *past* refusals to appeal by those prisoners who were deterred from doing so by fear of vindictiveness in resentencing. Besides the impossibility of making such a factual determination about countless persons' states of mind, it would not remedy *their* wrong by voiding the sentences of those who *did* have a higher resentence. And those who braved the danger of "vindictiveness" but were not re-

sentenced to a higher term, are unwronged. Finally as to the few who did receive higher sentences, their exercise of their appellate rights moots *that* justification for reversal, and with no evidence of actual vindictiveness, a reversal would be on a bare legal presumption, without a single factual allegation or proof.

As to the beneficial effect for the future for defendants who presently may be deterred from appealing by vindictiveness, the fact that all prior cases of such vindictiveness have been automatically reversed would have no greater effect than the knowledge that such a danger was a thing of the past.

The extent of the retroactive effect of this rule on sentencing judges and on the accepted procedure for sentencing is obvious. Imbued with the concept that the person to be sentenced is the man before them, as best they can determine his identity and character up to the minute of sentencing, they would have had no way of knowing what type of a record *Pearce* wished them to make; and this record-making is the procedural vehicle for the enforcement of *Pearce's* rule, to assure their sentence's validity.

The final criterion, the effect on the administration of justice would also tend to support non-retroactivity. Since it is logical to assume that some judges involved in these types of cases from the past have died or are unavailable to explain their reason for the sentence under attack, a retroactive application would have the effect of a trial *in absentia*. The basis for the existence of the rule is that vindictiveness *may* be present in a resentencing (as indeed it may be in any sentence; e.g. vindictiveness towards a defendant convicted at trial *for demanding that trial instead of pleading guilty*) and it *may* be a deterrent to an appeal. However, these possibilities do not warrant the presumption of prior vindictiveness which retroactivity could well mean.

*Miranda* v *Arizona*, 384 US 436, 16 L Ed 2d 694, 86 S Ct 1602 (1966) this Court, to protect the integrity of the fact-finding process, promulgated "procedural safeguards effective to secure the privilege against self-incrimination." (*Miranda, supra*, US at 444, L Ed 2d at 706). Confessions, incriminating and exculpatory statements alike were cov-

ered by the rule, in order to assure that the trial is not infected with the disease of falsehood through the use of inaccurate or untrue statements of a defendant, which, though not strictly speaking coerced, were not taken in an atmosphere that indicated a free and informed waiver of his Fifth Amendment privilege. These "procedural safeguards" have come to be known as the "*Miranda* warnings" in common parlance.

As important as these "*Miranda* warnings" are, this Court in *Johnson* v *New Jersey, supra,* applied the *Miranda* procedural safeguards prospectively only.

The parallel between the *Miranda-Johnson* model and the *Pearce-Payne* situation is striking. *Miranda* recognized an evil in the fact-finding process which, while it had been consistently condemned by the courts, this Court felt needed a method of assuring the absence of that evil, procedural safeguards: the *Miranda* Warnings. *Pearce* recognized the evil of vindictiveness for taking and winning an appeal by defendant, and provided procedural safeguards: record-making.

*Miranda* protected the fact-finding process; *Pearce* the sentencing and appellate processes.

*Johnson* applied *Miranda* prospectively only; *Payne* should apply *Pearce* in the same manner.

## SUMMARY OF ARGUMENT

1. With the record of this case indicating that the sentence appealed from was regular in form, within reasonable and the statutorily prescribed limits, and containing neither allegation, nor proof, nor judicial finding of actual vindictiveness on the part of the sentencing judge, this sentence was proper and legally sufficient under the law as it existed in 1968 when it was imposed. Furthermore the theory of making the punishment for crime fit the criminal supports the sentencing of a man based on the best and most accurate view of the defendant. Thus the investiga-

tion of the defendant's character should not be truncated at the time of the first sentencing but should include all relevant and reliable data, whenever and wherever gathered.

While judicial vindictiveness for having won an appeal is improper, and the fear of it by offenders contemplating an appeal may be reasonable, the vindictiveness should not be presumed and the fear should be proportionate to the danger. Judge Byrns' sentence has never been challenged as being motivated by actual vindictiveness, and Leroy Payne has not been deterred from appealing.

2. *North Carolina* v *Pearce, supra,* sought to protect the integrity of the sentencing and appellate processes. To that end this Court promulgated a rule intended to assure the preservation of a record to allow review to eliminate vindictiveness against a Defendant for winning an appeal. That rule allows for higher resentences upon new identifiable conduct by defendant since the first sentence. Such "identifiable conduct" should include not only *actual behavior* occurring after the first sentence, but any objective information which *first comes to the attention* of the sentencing authority after the first sentence, regardless of when the behavior "occurred", contrary to the interpretation of *Pearce* by the Michigan Supreme Court. Furthermore testimony of defendant which directly contradicts earlier sworn statements, and which is found by the court and jury trying the merits to be a lie, should be considered identifiable conduct warranting an increase in sentence. *Pearce* itself would sanction the Judge Byrns' sentence.

3. In any event, where *Pearce* is interpreted to prohibit a higher sentence, it should not be applied retroactively in these types of cases. The lower Courts have split on the question of retroactivity, but the better reasoned decisions are in favor of prospective application only. This Court's own criteria for retroactivity support prospectivity since the reason for the rule does not require retroactivity and the past reliance of law enforcement officials and the effect on the administration of justice requires prospective application only.

The *Miranda-Johnson* model is analogous to the *Pearce-Payne* situation and supports prospectivity.

## CONCLUSION

The sentence of Leroy Payne by Judge Byrns was reasonable and in accord with Due Process. It was technically proper and not the product of vindictiveness. Though it was prior to *North Carolina* v *Pearce,* it substantially complied with that case's requirements and, in any event, *Pearce* should not be applied retroactively. The *Pearce* rule's purpose does not require retroactivity and would seem better suited to prospectivity. Retroactivity would be unsuitable also from the standpoint of its effect on the administration of justice.

## RELIEF REQUESTED

For the above reasons, Petitioner requests this Court to reverse the decision of the Michigan Supreme Court and remand this case to that Court with instructions to re-instate the sentence of Leroy Payne by Berrien Circuit Court Judge Chester J. Byrns.

Respectfully submitted,

FRANK J. KELLEY
*Attorney General for the State of Michigan*

ROBERT A. DERENGOSKI
*Solicitor General*

RONALD J. TAYLOR
*Counsel for Petitioner*
*Prosecuting Attorney, Berrien County*

Business Address:
Court House
St. Joseph, Michigan 49085

By: JOHN A. SMIETANKA
*Assistant Prosecuting Attorney*

## RELEVANT DOCKET ENTRIES

| | |
|---|---|
| Nov. 5, 1962 | Municipal Court Arraignment |
| Dec. 6, 1962 | Preliminary Examination |
| Mar. 8, 1963 | Sentence (Judge Hadsell) |
| Oct. 12, 1966 | Delayed Motion for New Trial |
| Nov. 9, 1966 | Application for Leave to Appeal to Court of Appeals |
| May 16, 1967 | Order to Remand for Evidentiary Hearing |
| June 15, 1967 | Order for New Trial |
| Aug. 4, 1967 | Order for Change of Venue Trial |
| Aug. 30, 1967 | Sentence (Judge Byrns) |
| July 28, 1969 | Decision of Michigan Court of Appeals |
| Oct. 9, 1969 | Application for Leave to Appeal to Michigan Supreme Court |
| Jan. 26, 1970 | Decision Granting Leave to Appeal to Michigan Supreme Court |
| Feb. 7, 1972 | Petition for Certiorari to United States Supreme Court |
| Oct. 16, 1972 | Order Granting Certiorari |

## APPENDIX "G"

### ORDER SUPPRESSING CONFESSION
(Filed June 21, 1967)

At a session of said Court held in the Court House in the City of St. Joseph in said County on this 15th day of June 1967.

Present: Honorable Chester J. Byrns, Circuit Judge.

This matter having come on to be heard upon the Order of the Court of Appeals dated May 12, 1967, in the matter of the People of the State of Michigan, Plaintiff-Appellee vs. LeRoy Payne, Defendant-Appellant, No. 3207 which the Court of Appeals remanded this cause to the Circuit Court for the County of Berrien to assume jurisdiction and to make a determination upon a separate record of the voluntariness of the confession and of the plea of guilty by defendant on December 14, 1962 and that in the event the Court found the confession and plea of guilty to be involuntary, that the Court enter an order vacating the sentence and plea of guilty and that the defendant be re-arraigned and required to plead anew to the information.

The People having appeared by Assistant Prosecuting Attorney Harry J. Creager and the Defendant-Appellant having appeared in person and by his attorney Philip A. Brown and the Court having considered all of the testimony and evidence introduced at said hearing and being fully advised in the premises,

IT IS ORDERED that any confessions, admissions or other statements against interest, either verbal, written or stenographic during the period from the time of the Defendant-Appellant's arrest on November 5, 1962, through December 14, 1962 inclusive be and the same are hereby suppressed as being involuntary.

IT IS FURTHER ORDERED that Defendant-Appellant's sentence and plea of guilty heretofore made and entered in these proceedings be and the same are hereby vacated and are null and void.

IT IS FURTHER ORDERED that this cause be and the same hereby is remanded to the Municipal Court for the City of Benton Harbor for a preliminary examination together with such other and further proceedings which may properly come for said Court.

IT IS FURTHER ORDERED that Defendant-Appellant's bond on said charge is hereby fixed at $10,000.00.

(s) Chester J. Byrns
Circuit Judge

APPROVED:

John T. Hammond, Prosecuting Attorney
By: (s) Harry J. Creager,
Assistant Prosecuting Attorney

Business Address:
County Building
St. Joseph, Michigan

## APPENDIX "H"

### ORDER FOR CHANGE OF VENUE
(Filed August 9, 1967)

At a session of said Court held at the Court House in the City of St. Joseph on this fourth day of August, 1967.

Present: Hon. Chester J. Byrns, Circuit Judge.

This cause having come on to be heard upon the Motion of the Respondent, LeRoy Payne, for a change of venue, said Motion having attached thereto the affidavit of the respondent together with exhibits, the respondent having appeared in person and by his attorney Philip A. Brown and the People having appeared by Prosecuting Attorney John T. Hammond and the Court having considered the argument of counsel and the Court being fully advised in the premises:

IT IS ORDERED that Respondent's Motion for Change of Venue be and the same hereby is granted and said cause and the issues raised thereby shall be tried in the Circuit Court for Kent County, Michigan and the Clerk of the Court is directed to transmit all records in said cause to said Court for a trial by jury on the charge of assault with intent to murder.

(s) Chester J. Byrns
Circuit Judge

ATTEST:

(s) Mary Burns
Clerk, Dep.

Approved:

(s) John T. Hammond
Prosecuting Attorney

Business Address:
Court House
St. Joseph, Michigan

## APPENDIX "I" — AFFIDAVIT

## IN THE SUPREME COURT OF THE UNITED STATES

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PEOPLE OF THE STATE OF MICHIGAN,
*Petitioner,*
vs.
LEROY PAYNE,
*Respondent.*

No. 71-1005

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1. I am and have been since January 1, 1967, one of the Judges of the Second Judicial Circuit of Michigan (Berrien County).

2. I am the same person who executed at the request of the Supreme Court of Michigan on May 10, 1971, an affidavit relative to my participation in the case of the People v Leroy Payne and the same judge who sentenced Leroy Payne to 25 to 50 years.

3. In recently reexamining said affidavit, it appears that I could have noted in paragraph 6 that Judge Hadsell also had some limited opportunity to see and hear Mr. Payne when he testified as a witness for the prosecution against his accomplice or codefendant, Lionel Bradford, and admitted his personal involvement in the shooting of the two police officers, as more particularly set forth in paragraphs 9 and 10 of said affidavit.

4. Further, by way of supplement to said affidavit, this court did receive and study prior to sentencing Mr. Payne a supplemental pre-sentence report which it cannot under the present Michigan law make public, but which a higher court than this one can order produced.

Chester J. Byrns

County of Berrien
ss.
State of Michigan

On this 29th day of November, 1972, before me personally appeared Chester J. Byrns, one of the judges of the Second Judicial Circuit, who, being duly sworn, did acknowledge that he did sign the above affidavit by him made and that the same was true to the best of his knowledge and belief.

Ronald H. Smith
Notary Public, Berrien County, Michigan.
My commission expires March 5, 1976